In The United States Court of Appeals,
Fifth Circuit

No. 04-31171

LUV N' CARE, LTD.,

Plaintiff-Appellant,

VERSUS

INSTA-MIX, INC.; Umix, Inc.; Umixproducts, Inc.;Umix Sports, Inc.;Umixpro; and Umixbaby,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

Filed: January 25, 2006

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Luv n' care, Ltd. ("Luv n' care"), a Louisiana corporation, appeals the dismissal of its suit against Insta-Mix, Inc., and several related entities (collectively "Insta-Mix"), citizens of Colorado, for lack of personal jurisdiction. We reverse and remand.

I.

Luv n' care is an international corporation based in Monroe, Louisiana, that specializes in the design, manufacture, and sale of a variety of infant care products. Insta-Mix is a small Colorado corporation that holds the patent on a two-chambered plastic bottle with a freezable core, for use by both athletes and children. The design of the straw cap of Insta-Mix's bottle allegedly bears resemblance to a bottle cap produced by Luv n' care.[1]

Insta-Mix has sold 82,224 of its patented bottles to Wal-Mart and a few other vendors. Although Wal-Mart resells the product at its retail locations, Insta-Mix does not ship the product directly to Wal-Mart stores but, instead, trucks or third-party carriers assigned by Wal-Mart transport the bottles from Insta-Mix's dock in Colorado Springs to one of twenty-six distribution centers nationwide.

The vendor agreement that gives Wal-Mart the right to purchase and retail these bottles indicates that Wal-Mart assumes ownership of the bottles when they are loaded in Colorado Springs. The agreement also mentions several possible distribution centers, but none in Louisiana. Wal-Mart transported 3,696 copies of the bottle, or approximately 65 shipments, with total revenue to Insta-Mix of $8,923.20, to its distribution center in Opelousas, Louisiana.

Insta-Mix received and filled purchase orders from Wal-Mart via an "Electronic Data Interchange" ("EDI") system, which contains information regarding the price, quantity, and destination of each shipment. Once an order is filled, the EDI

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[1] Apparently the manufacturer, Royal King, claims proprietary rights to the molds from which the allegedly infringing bottle cap is produced.

system automatically sends to Wal-Mart an electronic invoice that contains the letterhead of an Insta-Mix-related entity and the destination address.

The record contains several invoices with a "send to" location of the Wal-Mart distribution center in Opelousas. Insta-Mix alleges that it had no knowledge of the destination of the products until it printed out information from the EDI system in response to a discovery request in this litigation. It appears that eventually some of Insta-Mix's bottles reached Wal-Mart stores in Louisiana, repackaged under the Wal-Mart trade name.

It is undisputed that Insta-Mix has no employees or agent for service of process in Louisiana and conducts no direct sales or marketing there. Rather, its only contact with Louisiana is its sales of items to Wal-Mart.

II.

Luv n' care sued Insta-Mix for copyright infringement, 17 U.S.C. § 101 *et seq.*, and trademark dilution and unfair competition under the Lanham Act, 15 U.S.C. §§ 1125(a)(1)(A) and (B). Insta-Mix moved to dismiss under Federal Rule of Civil Procedure 12(b)(2) and (3) for lack of personal jurisdiction and improper venue.

The magistrate judge issued a recommendation that the suit be dismissed because "[s]imply placing [a] product in the stream of commerce is not sufficient to create personal jurisdiction even if it were foreseeable that the product might end up in Louisiana." Because the magistrate judge found the jurisdictional issue dispositive, he did not reach the venue issue. The district court adopted the recommendation.

III.

We review *de novo* a district court's determination that it lacks personal jurisdiction over a non-resident defendant. *Adams v. Unione Mediterranea Di Sicurta*, 220 F.3d 659, 667 (5th Cir.2000). Where a defendant challenges personal jurisdiction, the party seeking to invoke the power of the court bears the burden of proving that jurisdiction exists. *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir.1982). The plaintiff need not, however, establish jurisdiction by a preponderance of the evidence; a *prima facie* showing suffices. *Id.* This court must resolve all undisputed facts submitted by the plaintiff, as well as all facts contested in the affidavits, in favor of jurisdiction. *Id.*

The Due Process Clause of the Fourteenth Amendment guarantees that no federal court may assume jurisdiction *in personam* of a non-resident defendant unless the defendant has meaningful "contacts, ties, or relations" with the forum state. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Jurisdiction may be general or specific. Where a defendant has "continuous and systematic general business contacts" with the forum state, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), the court may exercise "general" jurisdiction over any action brought against that defendant. *Id.* at 414, 104 S.Ct. 1868 n. 9. [2] Where contacts are less pervasive, the court may still exercise "specific" jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Id.* at

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[2] Federal courts may also always assume jurisdiction over a defendant in any action in which there is personal, in-state service of process. *Burnham v. Superior Court*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990).

414, 104 S.Ct. 1868 n. 8. This case presents only the question of specific jurisdiction.

A federal court may satisfy the constitutional requirements for specific jurisdiction by a showing that the defendant has "minimum contacts" with the forum state such that imposing a judgment would not "offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316, 66 S.Ct. 154. In *Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374 (5th Cir.2002), we consolidated the personal jurisdiction inquiry into a convenient three-step analysis: "(1) whether the defendant ... purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable." *Id.* at 378 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). The forum state may create, and this court would be bound to apply, additional jurisdictional restrictions by statute, *Adams*, 220 F.3d at 667, but Louisiana's "long-arm" statute extends jurisdiction to the constitutional limit, La. R.S. 13:3201(B), so the two inquiries in this case fold into one.

A.

To determine whether Insta-Mix has "minimum contacts" with Louisiana, we must identify some act whereby it "purposely avail[ed] itself of the privilege of conducting activities [there], thus invoking the benefits and protections of its laws." [3] The defendant's conduct must show that it

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[3] *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). A single purposeful contact may confer jurisdiction. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

"reasonably anticipates being haled into court" in Louisiana. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Likewise, a defendant may permissibly alter its behavior in certain ways to avoid being subject to suit. *Id.*

The district court erred in holding that placing a product into the stream of commerce, at least where the defendant knows the product will ultimately reach the forum state, does not rise to the level of "purposeful availment." This court has consistently held that "mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce." [4] We adopted this position in an effort faithfully to interpret *World Wide Volkswagen*, 444 U.S. at 298, 100 S.Ct. 559, which holds that a state does not offend due process by exercising jurisdiction over an entity that "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."

Where a defendant knowingly benefits from the availability of a particular state's market for its products, it is only fitting that the defendant be amenable to suit in that state.[5] We have, therefore, declined to follow the suggestion

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[4] *Ruston Gas Turbines v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir.1993) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 111, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)); *Bean Dredging Corp. v. Dredge Tech. Corp.*, 744 F.2d 1081 (5th Cir.1984).

[5] See *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 199-200 (5th Cir.1980) (finding jurisdiction where defendant had "attempted in [no] way to limit the states in which the [products] could be sold" but instead "had every reason to believe its product would be sold to a nation-wide market, that is, in any or all states").

of the plurality in Asahi, 480 U.S. at 112, 107 S.Ct. 1026, that some additional action on the part of the defendant, beyond foreseeability, is necessary to "convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[6] Applying this circuit's more relaxed "mere foreseeability" test to the facts of this case, we conclude that Insta-Mix's contacts with Louisiana are sufficient to withstand constitutional scrutiny.

Insta-Mix maintains that Wal-Mart had complete control over the ultimate destination of its goods once they left the warehouse in Colorado Springs and that Wal-Mart could even make a mid-stream decision to re-route the goods to other distribution centers not listed on the invoices. A "unilateral decision to take a chattel ... to a distant State" does not suffice to confer jurisdiction. World Wide Volkswagen, 444 U.S. at 314, 100 S.Ct. 559.[7] This case, though, does not present facts to the effect that a buyer transported goods intended for Louisiana to a distribution center in a far-away state. Rather, in 2002 and 2003 Insta-Mix filled approximately sixty-five purchase orders for items bound for Louisiana and sent invoices to Wal-Mart confirming the same.

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[6] The *Asahi* plurality listed the following as possible additional actions that would evidence an intent to serve the market of the forum state: "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.*

[7] *See also Burger King*, 471 U.S. at 475, 105 S.Ct. 2174 (reasoning that defendant may not be haled into court on account of "random, fortuitous, or attenuated" contacts) (internal quotations omitted).

Insta-Mix claims that its employees had no actual knowledge of the intended destination of its goods until it consulted the EDI system in preparation for this litigation. This claim is implausible and could not defeat jurisdiction even if true. It is eminently foreseeable that Insta-Mix's products would reach the market indicated on the company's invoices. In fact, Insta-Mix derived substantial revenue (about 4.5% of its total distribution) from its sale of thousands of units bound for Opelousas.[8] Although businesses should be able to take advantage of the increased efficiencies made possible by the electronic processing of purchase orders, they cannot then claim ignorance of the contents of those orders once their products inevitably reach the intended market.[9]

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[8] *See Bean Dredging*, 744 F.2d at 1085 (deciding that introducing merely thousands, not millions, of items into the stream of commerce "is not enough to convince us that [defendant] had no interest in reaching as broad a market as it possibly could.... [T]he defendant here evidenced no attempt to limit the states in which its [products] would be sold and used."); *cf. World Wide Volkswagen*, 444 U.S. at 299, 100 S.Ct. 559 (holding that the "marginal revenues" derived from the fact that a product is merely "capable of use" in a distant state is "too attenuated a contact" to support jurisdiction).

[9] *See Asahi*, 480 U.S. at 121, 107 S.Ct. 1026 (Brennan, J., concurring) (finding for a four-Justice plurality that although defendant "did not design or control the system of distribution that carried its [products] into [the forum state, defendant] was aware of the distribution system's operation, and it knew it would benefit economically from the sale in [the forum state] of products incorporating its components.") (internal quotations omitted). We further agree with Luv n' care that a contrary holding would permit foreign defendants to avoid jurisdiction in the United States by structuring their data systems to shield employees from the knowledge that their products ultimately will reach the United States.

Finally, Insta-Mix argues that it has structured its primary conduct to avoid jurisdiction by including in the vendor agreement a condition that transfers ownership from Insta-Mix to Wal-Mart at the time that Wal-Mart receives its shipments in Colorado Springs. Jurisdiction, however, "does not depend on the technicalities of when title passes;" rather, jurisdiction may attach both to manufacturers who supply their own delivery systems and to those that make use of the distribution systems of third parties. Oswalt, 616 F.2d at 197 n.8.[10]

In the interest of promoting that "degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," World Wide Volkswagen, 444 U.S. at 297, 100 S.Ct. 559, we conclude that a F.O.B. term does not prevent a court from exercising personal jurisdiction over a non-resident defendant where other factors, such as the quantity and regularity of shipments, suggest that jurisdiction is proper.[11] This reasoning is supported by authority that

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[10] We have suggested, however, that the existence of a Free On Board ("F.O.B.") term in a contract is one factor to consider in determining whether the defendant has "minimum contacts" with the forum state. *See Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1136 (5th Cir.1987) (finding that the "contact was weakened even further by the fact that the sale was initiated by the buyer and was shipped F.O.B. California, the seller's place of business."); *Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184, 188-89 (5th Cir.1978) (concluding that F.O.B. shipment, without more, does not constitute purposeful availment of the laws of the forum state).

[11] For example, in *Charia*, 583 F.2d at 189, the court found that "four sporadic and isolated sales" did not establish a sufficient basis for assertion of jurisdiction but noted that a case in which defendant "had supplied its product to the forum state in large quantities over a lengthy period of time" might be treated differently. Likewise, in *Singletary* the

states that the primary purpose of a F.O.B. term is to allocate the risk of damage to goods between buyer and seller.[12] Accordingly, Insta-Mix purposely availed itself of the benefit of the Louisiana market for its bottle, thereby establishing "minimum contacts" with the forum state.[13]

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defendant had sold only one $33 part to a resident of the forum state. *See Singletary*, 828 F.2d at 1136.

[12] Nuovo Pignone, 310 F.3d at 380 n. 5 (stating that "incoterms are used ... to allocate risk between buyers and sellers"); see also William V. Roth, Jr. & William V. Roth III, Incoterms: Facilitating Trade in the Asian Pacific, 18 U. PA. J. INT'L ECON. L. 731, 734 (1997) (describing the division of risk between buyer and seller in a standard incoterm and noting that "[m]ost importantly, the risk of damage to the goods shifts from seller to buyer exactly at the point where the goods" are surrendered to the carrier) (internal citations omitted).

[13] We disagree with Insta-Mix that this conclusion means that it must choose between doing business with Wal-Mart or being subject to suit in all fifty states. It is possible that Insta-Mix will avoid suit in a jurisdiction that requires some additional act beyond "mere foreseeability" for personal jurisdiction to attach. *See, e.g., Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir.1992). Moreover, we do not speak to a situation in which, for example, jurisdiction is asserted in a state to which the allegedly offending Insta-Mix product has not been regularly shipped in substantial quantities directly from Insta-Mix facilities.

Insta-Mix could also attach conditions to its vendor agreement that forbid Wal-Mart from shipping to those states that operate under a "mere foreseeability" regime, or to all distribution centers outside the Great Plains, or to any forum in which mounting a defense would be inconvenient. The fact that it has not done so supports our conclusion that Insta-Mix intends to avail itself of as wide a market for its goods as possible. *See Bean Dredging*, 744 F.2d at 1085. Until presented with such a case, we reserve judgment on the ultimate effectiveness of any contractual condition designed to avoid jurisdiction.

In those cases, the court found that the F.O.B. condition in the contract reinforced the holding that jurisdiction in the forum state was unforeseeable. Here, however, jurisdiction is foreseeable because of the regularity and quantity of shipments and the presence of a destination address on defendant's invoices. Where jurisdiction is otherwise foreseeable, a F.O.B. term cannot deprive the court of jurisdiction over the defendant.

B.

It is not enough to satisfy due process that Insta-Mix has some "minimum contacts" with Louisiana. Rather, the underlying cause of action must "arise out of" the defendant's contacts with the forum state.[14] Luv n' care alleges that the presence of Insta-Mix's products in Louisiana infringed on Luv n' care's copyright.

"[T]his court has been reluctant to extend the stream-of-commerce principle outside the context of products liability cases," including cases involving "contract or copyright." *Nuovo Pignone*, 310 F.3d at 381. This is because contracting parties have more flexibility to tailor their relationship in view of jurisdictional considerations than do the manufacturer and consumer in a typical products liability case. *Id.* Nevertheless, we have found jurisdiction where "the same public policy concerns that justify use of the stream-of-commerce principle in the products liability context are present." *Id.*

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[14] See *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (opining that "the relationship among the defendant, the forum, and the litigation ... [is] the central concern of the inquiry into personal jurisdiction"); *Nuovo Pignone*, 310 F.3d at 378.

In *Nuovo Pignone*, the defendant Fagioli, an Italian shipper, allegedly damaged plaintiff's cargo with a defective onboard shipping crane while docking and unloading at a Louisiana port. We found jurisdiction even though Fagioli, like Insta-Mix, employed third-party intermediaries at the point of injury, i.e., the unloading dock. We further opined that Fagioli should have considered the possible damage that a defective crane aboard its vessel would cause in the forum state. Similarly, Insta-Mix should have known, when it availed itself of the Louisiana market for infant care products, that it could face potential liability from competitors with similarly-designed items.[15]

The closest analogue to the present case is *Ham v. La Cienega Music Co.*, 4 F.3d 413 (5th Cir.1993), in which we denied jurisdiction because there was a "highly attenuated" relationship between defendant's contact with the forum state and plaintiff's declaratory judgment action for copyright infringement. *Ham*, 4 F.3d at 416. In *Ham*, however, the allegedly infringing song was different from the one that had been distributed through the stream of commerce to the forum state. The court suggested the result might be different if the song distributed in Texas and the allegedly infringing song were one and the same. *Id.* at 416 n.13.

Luv n' care claims infringement from the same bottle that traveled through the stream of commerce from Colorado to Louisiana. This connection between the allegedly infringing

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[15] See also *Gulf Consol. Servs., Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071, 1073-74 (5th Cir.1990) (finding jurisdiction in a breach of warranty action).

product and the forum state is sufficient to confer personal jurisdiction.[16]

C.

It remains for us to inquire whether the exercise of jurisdiction would "offend traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316, 66 S.Ct. 154. When a plaintiff makes its *prima facie* case that the defendant has "minimum contacts" with the forum state, the burden of proof shifts to the defendant to show that the exercise of jurisdiction would be unreasonable. *Nuovo Pignone*, 310 F.3d at 382. In conducting the fairness inquiry, we examine (1) the burden on the nonresident defendant, (2) the forum state's interests, (3) the plaintiff's interest in securing relief, (4) the interest of the interstate judicial system in the efficient administration of justice, and (5) the shared interest of the several states in furthering fundamental social policies. Felch v. Transportes Lar-Mex SA De CV, 92 F.3d 320, 324 (5th Cir.1996).

Insta-Mix relies primarily on the third and fourth elements, arguing that Luv n' care has not named Wal-Mart, the retailer, nor Royal King, the alleged manufacturer of the bottle top, as the more natural defendants. Nor can the district court grant full injunctive relief where Wal-Mart remains free to sell, and Royal King remains free to produce,

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[16] This reasoning applies with equal force to Luv n' care's claims of trademark dilution and unfair competition under the Lanham Act, which in fact instructs the court, when deciding whether to issue an injunction to protect the trademark owner, to consider, inter alia, "the degree of recognition of the mark in the trading areas and channels of trade used by the mark's owner and the person against whom the injunction is sought." 15 U.S.C. § 1125(c)(1)(F). We reserve judgment on whether jurisdiction would lie for other causes of action outside the arena of products liability.

the infringing cap. Therefore, Insta-Mix portrays this action as an effort by Luv n' care, a major manufacturer, to intimidate a small competitor into exiting the market.

If Luv n' care's suit is indeed frivolous, the district court presumably will deal with that deficiency. But, where a product allegedly causes economic injury in Louisiana, it is in the interest of that state to have its courts mediate the dispute. Furthermore, it is not unreasonable to ask Insta-Mix to defend in Louisiana, where the company avails itself of the benefit of that state's market for thousands of iterations of its product. The forum state (Louisiana) and the plaintiff (Luv n' care, which is organized under Louisiana law and based there) obviously have some legitimate interest in litigating this matter in Louisiana, where there has been regular distribution of a number of the allegedly offending products.[17] Therefore, traditional notions of fair play and substantial justice do not require that this suit be dismissed for want of personal jurisdiction.[18]

The judgment of dismissal is REVERSED, and this matter is REMANDED for further proceedings.[19]

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[17] *See Bean Dredging*, 744 F.2d at 1085 (reasoning that "[b]ecause the product was used in Louisiana, because the defects surfaced in Louisiana, because the economic injury has befallen a resident of Louisiana ... that state has an interest in providing a forum for this suit").

[18] We also note that although Wal-Mart may be a more natural defendant in this action, the vendor agreement between Wal-Mart and Insta-Mix states that Insta-Mix shall defend and indemnify Wal-Mart against, *inter alia*, any actual or alleged copyright infringement.

[19] Because the district court did not rule on Insta-Mix's alternative argument on improper venue, we do not reach that issue, and the parties are free to raise it on remand.

DeMOSS, Circuit Judge, specially concurring:

I concur in the majority opinion because I recognize that Fifth Circuit precedent binds us to follow the "stream of commerce" approach in personal jurisdiction cases;[20] however, I write separately for two reasons: (1) to note that if it were not for that precedent, I would certainly vote to decide this case under the "stream-of-commerce-plus" approach announced by Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), and (2) to highlight how this case contributes to the circuit split created by *Asahi*, a split I urge the Supreme Court to resolve.

In my opinion, Justice O'Connor's stream-of-commerce-plus theory is the more constitutionally defensible of the two theories of minimum contacts to emerge from *Asahi*. The principle of "minimum contacts" is a court-created principle that effectively limits a state's exercise of jurisdiction over nonresident defendants. Jurists have long recognized "that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that

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[20] *See Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir.1993). Writing for the unanimous panel in *Ruston*, I described the Fifth Circuit's long-time support of the "stream of commerce" theory and rejection of the "stream-of-commerce-plus" theory. *Id.* In that case, application of the "stream of commerce" theory to the facts at hand led to a reasonable result, in part because *Ruston* involved more than mere placement of a product into the stream of commerce. *See id.* at 417-18 (third-party defendant shipped products directly to forum, sent employees to forum to consult with customers). The exercise of personal jurisdiction over Insta-Mix in this case, however, stretches the stream of commerce theory to its outer limits, and thereby reveals the flaws in the stream of commerce approach.

territory so as to subject either persons or property to its decisions." *Pennoyer v. Neff*, 95 U.S. [5 Otto] 714, 722, 24 L.Ed. 565 (1877). Thus, the "minimum contacts" test was developed over time to define the necessary contact a nonresident defendant must have with a state before the defendant can be subjected to suit there. *Asahi* is the last in a long line of Supreme Court cases to define the contours of that test, and it left the test in a state of complete disarray. Only three Justices joined the portion of Justice O'Connor's plurality opinion that embraced the stream-of-commerce-plus approach to minimum contacts; of the five remaining Justices, three Justices joined Justice Brennan in a concurrence that embraced the stream of commerce approach and Justice Stevens wrote his own concurrence embracing neither. It is the stream of commerce approach that the Fifth Circuit follows and that I criticize here (although I recognize its binding effect). The stream of commerce, or "mere foreseeability," approach requires only that a nonresident defendant place its product in the stream of commerce with the expectation that the product will reach the forum state. *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 380 & n. 7 (5th Cir.2002). As Judge Niemeyer of the Fourth Circuit eloquently stated in *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir.1994), "To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism." Justice O'Connor's stream-of-commerce-plus approach states that mere foreseeability is not enough and requires "[a]dditional conduct of the defendant ... indicat[ing] an intent or purpose to serve the market in the forum State," and thereby better comports with our country's principles of federalism. *See Asahi*, 480 U.S. at 112, 107 S.Ct. 1026.

This case is the proverbial straw that breaks the camel's back because it stretches the stream of commerce theory beyond its past limits and thus deepens the divide between circuits that require "additional conduct" and those that do not. Subjecting Insta-Mix to suit in Louisiana creates a "Wal-Mart exception," rendering any small company that sells a product to Wal-Mart subject to suit in any state in the nation in which Wal-Mart resells the company's products. Insta-Mix did no business in Louisiana; it had no agent for service of process in Louisiana; it negotiated a contract with Wal-Mart in Arkansas and it sold and delivered its products to Wal-Mart for its plant in Colorado; and Wal-Mart picked up Insta-Mix's products in Colorado on a Wal-Mart truck (or a truck contracted for by Wal-Mart). None of the plus factors defined by Justice O'Connor in Asahi are satisfied on the record here: Insta-Mix's product was not designed or designated for the Louisiana market; Insta-Mix did not advertise in Louisiana; Insta-Mix established no channels for providing regular advice to customers in Louisiana; and Insta-Mix did not market its product through a distributor who agreed to serve as a sales agent in Louisiana. *Asahi*, 480 U.S. at 112, 107 S.Ct. 1026. In a stream-of-commerce-plus circuit, personal jurisdiction would not attach in this case. But under the mere foreseeability test that controls our circuit, Insta-Mix is subject to suit in Louisiana. This result on this record defies principles of federalism and therefore presses for the repudiation of the "stream of commerce" approach to personal jurisdiction.

For the above reasons, I hope Insta-Mix will apply for a writ of certiorari and I urge the Supreme Court to take up the minimum contacts issue and resolve it and the increasing circuit divide with clarity. The recent changes in the composition of the Court should produce a new effort by the

Court to definitively answer this controversy. The sovereignty of the individual states is on the line.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

LUV N' CARE, LTD.,	)
Plaintiff,	)
v.	)
INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, and UMIXBABY	)
Defendants.	)

ORDER AND AMENDED JUDGMENT

Upon consideration of Plaintiff Luv n'care's Motion for Modification of Judgment under Fed. R. Civ. Pro. 50, 59 and 60;

It is hereby ordered that Plaintiff's motion is GRANTED.

The Judgment entered by the Court on October 12, 2004 in this matter, and any findings of fact and conclusions of law therein, are hereby amended and modified under Fed. R. Civ. Pro. 50, 59 and 60 to provide that Plaintiff's claims have been dismissed without prejudice.

Dated: October 28, 2004
Monroe, Louisiana

-Signed-
HON. ROBERT G. JAMES
U.S. DISTRICT COURT
JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LUV N CARE, LTD.	CIVIL ACTION NO. 03-1657-M
VERSUS	U.S. DISTRICT JUDGE ROBERT G. JAMES
INSTA-MIX, Inc., et al	U.S. MAGISTRATE JUDGE JAMES D. KIRK

REPORT AND RECOMMENDATION

Before the court is defendants' motion to dismiss, Doc. #8 referred to me by the district judge for report and recommendation. The motion seeks dismissal based on lack of personal jurisdiction over the defendants or, alternatively, for lack of proper venue. Limited discovery on these issues has been completed.

Background

Claimant, Luv N Care, Ltd. (Luv N Care) is a Louisiana corporation which manufactures baby drinking bottle products. It claims defendants, all related entities owned by Insta-mix, Inc. (Insta-mix), infringed on its non-patented bottle design, and seeks declaratory relief and damages. Defendant, Insta-Mix, is a Colorado corporation and claims this Louisiana court has no jurisdiction over it.

Discussion

Insta-Mix asserts that it sells its product only to distributors and does not sell retail anywhere in the United States. It sells primarily to Wal-Mart Stores, Inc. headquartered in Bentonville Arkansas. Insta-Mix asserts that it has made no direct sales of products to Louisiana and has done no direct marketing of its products in Louisiana and has no sales personnel in Louisiana. It has not "set foot in" Louisiana, it claims and has not conducted business activities in Louisiana. Claimant urges that, because defendants have sold to Wal-Mart, Louisiana courts have jurisdiction.

The burden to make a prima facie showing that the defendants have meaningful contacts with Louisiana rests with the plaintiffs. Revell v. Lidov, 317 Fed. 3d 467 (5th C. 2002); International Shoe Co. v. State of Washington, 66 S. Ct. 154 (1945); Wilson v. Belin, 20 Fed. 3d 644 (5th C. 1994), cert. den., 115 S. Ct. 322. The court must accept plaintiffs' uncontroverted allegations as true, but it may consider affidavits and other documentation resolving conflicts in favor of claimant. See Guidry v. U. S. Tobacco Co., Inc., 188 Fed. 3d 619 (5th C., 1999); Revell, supra.

Federal courts in Louisiana may exercise jurisdiction over a non-resident defendant only to the extent allowed by Louisiana's Long Arm statute and as consistent with due process. Stripling v. Jordan Production Co., LLC, 234 Fed. 3d 863 (5th C. 2000). Louisiana's long arm statute extends jurisdiction to the constitutional limits of due process. La. R.S. 13:3201(B). Burstein v. State Bar of California, 693 Fed.2d 511 (5th C. 1982). Jurisdiction consistent with due process exists where the defendant has purposely availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state, and

the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." Mink v. AAAA Development LLC, 190 Fed. 3d 333, 336 (5th C. 1999) (quoting International Shoe., supra).

Minimum contacts may be established either through contacts sufficient to assert specific jurisdiction or contact to assert general jurisdiction. Alpine View Co. Ltd. v. Atlas Coco AB, 205 Fed. 3d 208, 214 (5th C. 2000). Only where a non-resident defendant has "purposely directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities" are the defendants' contacts sufficient to support the exercise of specific jurisdiction over that defendant. Burger King v. Rudzewicz, 105 S. Ct. 2174 (1985). Stated differently, specific jurisdiction exists where a defendant 'purposely avails itself of the privileges of conducting activities within the forum state, thus invoking the benefits of its laws." Dickson Marine, Inc. v. Panalpina, Inc., 179 Fed. 3d 331 (5th C. 1999).

The minimum contacts required to pass constitutional muster may be those unrelated to the claimant's cause of action (general jurisdiction), or may be related to claimant's cause of action (specific jurisdiction).

Louisiana's long arm statute provides:

"§3201. Personal jurisdiction over nonresidents

A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:

(1) Transacting any business in this state.
(2) Contracting to supply services or things in this State.
(3) Causing injury or damage by an offense or quasi offense committed through an act or omission in this State.
(4) Causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits Business, or engages in any other persistent course of conduct, or derives revenue from goods used or consumed or services rendered in this state.
(5) Having an interest in, using or possessing a real right on immovable property in this state.
(6) Non-support...
(7) Parentage...
(8) Manufacturing of a product or component thereof which caused damage or injury in this state...

B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the constitution of the United States."

In this case, plaintiffs have not shown by affidavit or otherwise any history of continuous and systematic contacts between the non-resident defendants and Louisiana. Plaintiffs point to no activities of defendants in Louisiana other than those they allege are related to the activities giving rise to this lawsuit. In addition, the evidence reflects that defendant companies do not now and have never done

business in Louisiana and do not employ people in the state. Defendants have no agent for service in the state.

In regard to specific jurisdiction, plaintiffs point only to the fact that defendants ship a small amount of products to one of Wal-Mart's distribution centers located near Opelousas Louisiana. Plaintiff claims that because defendants placed the product into the steam of commerce, this court has jurisdiction over Insta-Mix.

No evidence is contained in the record as to the geographic area Wal-Mart's distribution center serves, but the evidence does reflect that Wal-Mart has some 26 centers nationwide. It is safe to assume, and the affidavit of Nouri Hakim shows, that defendants' product is sold in some Louisiana Wal-Mart stores. However, the testimony by deposition of James Holley reflects that sales to Wal-Mart were negotiated by him in Bentonville Arkansas. The orders were entered electronically, and although the invoices show Wal-Mart's intended destination of the goods bought from Insta-Mix, those goods are sold in Colorado and picked up by Wal-Mart on its own truck or by a trucking company which Wal-Mart hires in Colorado. In other words, Insta-Mix does not ship to the distribution center in Louisiana, but rather places its goods on a Wal-Mart truck and Walmart takes the goods where it wants to. The fact that the invoice shows a particular destination, is apparently for Wal-Mart's use and benefit and does not change the fact that Insta-Mix sold and delivered the products in Colorado. Simply placing the product in the stream of commerce is not sufficient to create personal jurisdiction even if it were foreseeable that the product might end up in Louisiana. See World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980). Here Insta-Mix has not purposely availed itself of the benefits of Louisiana.

Claimant cites Bean Dredging Corporation v. Dredge Technology Corporation, 744 Fed 2d 1081 (5th C. 1984) for the proposition that where a manufacturer distributes its product broadly through a distributor, that manufacturer may be subject to a particular forum's jurisdiction. In this case, however, the record reveals that Insta-Mix sold a total $8,923.20 to Wal-Mart which Wal-Mart chose to ship to Louisiana. No direct sales in Louisiana were made to anyone. The facts presented here are easily distinguished from Bean Dredging.

Similarly, plaintiff points to Vault Corporation v. Quaid Software Limited, 775 Fed. 2d 638 (5th C. 1985). However, Vault too is easily distinguishable. There the defendant advertised in national magazines and it made direct sales to Louisiana customers. Here Insta-Mix had no expectation that the goods sold and delivered to Wal-Mart in Colorado would be purchased by consumers in Louisiana. Worldwide Volkswagen, supra. As Defendant aptly points out in brief, were the court to find that jurisdiction exists under these facts, then everyone who does business with Wal-Mart shall have automatically consented to jurisdiction in almost every state in the country. Such is simply not consistent with the Supreme Court's holding in Worldwide Volkswagen.

Because I find that Insta-Mix had insufficient contacts with Louisiana to justify exercise of personal jurisdiction over it, I need not reach the alternative argument regarding improper venue.

For the foregoing reasons, IT IS RECOMMENDED, that defendants' Motion to Dismiss be granted, and that claimant's claims be dismissed.

OBJECTIONS

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b), the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the district judge at the time of filing. Timely objections will be considered by the district judge before he makes his final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT UPON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED in chambers, in Alexandria, Louisiana, on this the 24th day of August 2004.

/s/ James D. Kirk
JAMES D. KIRK
UNITED STATES
MAGISTRATE JUDGE

(3)

No. 05-1232

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

INSTA-MIX, INC., UMIX, INC., UMIXPRODUCTS, INC., UMIX SPORTS, INC., UMIXPRO, and UMIXBABY,

Petitioners,

v.

LUV N' CARE, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit's decision that due process permits jurisdiction over an entity that delivers products into the stream of commerce with the expectation they will be purchased by consumers in the forum State (an approach it has followed before and after *Asahi*, further to *World-Wide Volkswagen*), requires review by this Court after extensive contacts by Petitioner with the Louisiana forum.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Luv n' care, Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

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TABLE OF CITED AUTHORITIES

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Cases:

Aetna Insurance Company v. Hartshorn, 477 F.2d 97 (5th Cir. 1973) 15

Akro Corp. v. Luker, 45 F.3d 1541 (Fed. Cir. 1995) 1, 14

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Dever v. Hentzen Coatings, Inc., 380 F.3d 1070 (8th Cir. 2004) 11, 12

Cited Authorities

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Galvan v. Press, 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737 (1954) 15

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S. Ct. 2099 (1982) 16

Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975) 1, 14, 15

International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945) 4, 15

Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir. 1989) 8

Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939 (1994) 10

McGee v. Int'l Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199 (1957) 6

Omni Capital, Int'l v. Rudolf Wolff & Co., 484 U.S. 97 (1987) 14, 16

Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980) 8

Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 109 S. Ct. 1917 (1989) 11

Cited Authorities

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Ruston Gas Turbines, Inc. v. Donaldson Company, Inc., 9 F.3d 415 (5th Cir. 1993) 7, 8

Stanton v. St. Jude Medical, Inc., 340 F.3d 690 (8th Cir. 2003) 11, 12

Vandelune v. 4B Elevator Components Unlimited, 148 F.3d 943 (8th Cir. 1998) 11, 12

World-Wide Volkswagen v. Woodson, 444 U.S. 286, 100 S. Ct. 559 (1980) .....*passim*

Other Authorities:

Christopher M. Porterfield, *Note and Comment, Which Stream to Follow: Why the Eleventh Circuit Should Adopt a Broader Stream of Commerce Theory in Light of Growing E-Commerce Markets*, 20 Ga. St. U. L. Rev. 539 (2003) 12-13

Connie M. Ericson, *Casenote: CMMC v. Salinas: The Texas Long-Arm Statute Does Not Reach French Equipment Manufacturer (But Maybe it Should)*, 20 Hous. J. Int'l L. 493 (1998) 10

Kristin R. Baker, *Comment, Product Liability Suits and the Stream of Commerce after Asahi: World-Wide Volkswagen Is Still the Answer*, 35 Tulsa L.J. 705 (2000) 5

Cited Authorities

Page

Lori Elizabeth Jones, *Note, Lesnick v. Hollingsworth & Vose Co. – The Pure Stream of Commerce No Longer Flows Through the Fourth Circuit*, 29 U. Rich. L. Rev. 421 (1995) 11

Richard M. Elias, *Note, In Search of a Broader Stream of Commerce Theory: The Eighth Circuit Streams Past Inconsistencies in Favor of Equitable Results*, 67 Mo. L. Rev. 99 (2002) 12

Timothy C. Lynch, *Personal Jurisdiction: Roman Candles and Bottle Rockets: The Eighth Circuit Blows up the "Stream of Commerce Plus" Analysis in Barone v. Rich Bros. Interstate Display Fireworks, Inc.*, 29 Creighton L. Rev. 1371 (1996) 12

CONSTITUTIONAL QUESTION INVOLVED

Petitioners have asserted that the constitutional provision implicated is the Due Process Clause of the Fourteenth Amendment. In fact, subject matter jurisdiction exists here by virtue of a federal question, rather than diversity of the parties. Therefore, the provision at issue is, more accurately, the Due Process Clause of the Fifth Amendment. *See, e.g., Akro Corp. v. Luker*, 45 F.3d 1541, 1544-1545 (Fed. Cir. 1995); *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1143 (7th Cir. 1975); *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1389 n.2 (8th Cir. 1991).

STATEMENT OF THE CASE

Respondent Luv n' care is a corporation headquartered in Monroe, Louisiana that is internationally known for the many innovative childrens' and baby products that it has designed, popularized, and sold worldwide. Upon learning that Petitioner Insta-Mix was selling unauthorized copies of Luv n' care's original "flip top" design for no-spill drinking cups, Luv n' care instituted suit in the Monroe Division of the U.S. District Court for the Western District of Louisiana to redress the violation of its intellectual property rights.

In the District Court, Insta-Mix moved to dismiss for lack of personal jurisdiction, alleging that it had never done any business in Louisiana and had no contacts with Louisiana. As a result, it contended that a suit in a Louisiana forum would violate constitutional due process.

Subsequent jurisdictional discovery demonstrated that Wal-Mart had electronically transmitted dozens of purchase orders to Insta-Mix, seeking products for Wal-Mart's Louisiana stores.

In response to those orders, Insta-Mix shipped accused products[1] to Wal-Mart on sixty seven[2] separate occasions. Products were directly shipped from Insta-Mix's Colorado warehouse to the Wal-Mart distribution center in Opelousas, Louisiana responsible for servicing Wal-Mart's Louisiana retail stores.[3]

These shipments by Insta-Mix to Louisiana were conducted on a virtually weekly basis for nearly two years.[4]

1. Insta-Mix's claim that Wal-Mart (not Insta-Mix) shipped the products to Louisiana is misleading. Pet. 4. At the Insta-Mix warehouse, Insta-Mix provided the goods to various shippers (including independent carriers such as the United Parcel Service) for delivery to Wal-Mart's Opelousas, Louisiana distribution center. This is not disputed. However, to avoid the consequences of its actions, Insta-Mix attempted to recast this as 'shipment by Wal-Mart'. To do so, it alleged ignorance of the product destination to try to nullify the importance of electronic notice, and relied upon an F.O.B. term in the vendor agreement regarding passage of title. The Fifth Circuit properly rejected Insta-Mix's claims as implausible and irrelevant. App. 7 - 9.

2. The Fifth Circuit's decision indicates that there were "approximately sixty five" shipments (App. 2) due to the fact that jurisdictional discovery demonstrated the presence of sixty seven shipments, though Insta-Mix was only able to locate invoices for sixty four of them. However, Insta-Mix did not dispute that sixty seven orders had been placed and filled.

3. Wal-Mart maintains a series of distribution centers nationwide. A party selling product to Wal-Mart ships products to the appropriate distribution center for the stores in the desired geographic region.

4. In addition to Wal-Mart, Insta-Mix sold to chains such as Burlington and the Army/Navy Exchange, both of which are nationwide entities and could have potentially sold within Louisiana. Though Insta-Mix was directed to provide information regarding those sales, no response was provided. It was also learned during jurisdictional discovery that Insta-Mix had shipped small numbers of other products (not the subject of this lawsuit) to Louisiana as well.

The products were shipped using common carriers, including independent shippers such as United Parcel Service (UPS). Almost two hundred thousand units of accused product were introduced into the stream of commerce nationwide, including at least 3,696 products shipped to Louisiana.[5]

The District Court dismissed, adopting the Magistrate's Recommendation and Report. App. 19-27. On appeal, the Fifth Circuit reversed, holding that Insta-Mix had purposefully availed itself of the Louisiana market for the accused product, that the underlying cause of action arose out of Insta-Mix's contacts with the forum, and that the exercise of jurisdiction would be fair and reasonable. App. 5, *et seq.* In a special concurrence, Circuit Judge DeMoss acknowledged being bound by controlling Fifth Circuit precedent, but asserted that this case "deepens the divide" between those circuits requiring "additional conduct" and those that do not *post-Asahi*, and requested that this Court take up and resolve the minimum contacts issue. App. 17. Insta-Mix then filed for a petition for a writ of certiorari, which Respondent opposes herein as set forth below.

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5. Insta-Mix's accused products included a first generation copy of Luv n' care's top, followed by an even closer second generation copy. The second generation version is virtually indistinguishable from Luv n' care's, and was created when the initial imitation was not sufficiently successful. Based on Insta-Mix's records provided to date (which were not complete, *see*, *supra* n.4), at least 194,058 units of accused first and second generation products were distributed nationwide. Insta-Mix has tried to reduce its exposure by claiming that only the second version is similar to Luv n' care's. Based on the incomplete records it has provided, it has sold at least 82,224 units of the second generation product.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Decision Is Well Grounded In Precedent Prior to the *Asahi* Pluralities

As interpreted by this Court, specific jurisdiction fulfills due process when: (1) the defendant has "minimum contacts" with the forum; and (2) exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). Insta-Mix petitions here on the basis of a post-*Asahi* split between those circuits that have adopted Justice Brennan's approach ("stream of commerce"), and those that have adopted Justice O' Connor's approach ("stream of commerce plus"), to assess the minimum contacts question. *Asahi Metal Industry Co. Ltd. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026 (1987).[6] However, case law prior to and independent of *Asahi* fully supports the Fifth Circuit's decision.

As this Court stated in *World-Wide Volkswagen*, if the sales of product are not an isolated occurrence, but arise from a party's efforts to directly or indirectly serve the market for its products in other States, it is not unreasonable to subject that party to suit in one of those States. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297-298, 100 S. Ct. 559, 567 (1980). This was the very situation presented by Insta-Mix's activities.

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6. The *Asahi* Court produced three separate plurality opinions, authored by Justice Brennan, Justice O'Connor, and Justice Stevens. Justice Brennan's "stream of commerce" plurality and Justice O'Connor's "stream of commerce plus" plurality each took different views on the requirements for minimum contacts under *International Shoe* and subsequent precedent such as *World-Wide Volkswagen*. Justice Stevens' opinion found it unnecessary to reach the minimum contacts issue, holding that the fair play and substantial justice portion of the *International Shoe* test had not been satisfied.